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RIGHT TO INDUCE EMPLOYEES TO BREACH THEIR CONTRACT OF SERVICE BY BECOMING MEMBERS OF A LABOR UNION.

Attention is again directed to the world-old struggle between employer and employed by recent decisions of the courts, among which is Cyrus Currier & Sons v. International Moulders' Union, decided by the Court of Chancery of New Jersey, and reported in 115 Atl. 66. During the late war union labor made rapid progress in the acquisition of numbers and advantages, which it is now striving to hold. In the present period of depression employers are seeking to firmly establish the open shop.

The closed shop, made so without the consent of the employer freely given, is opposed to the fundamentals of democracy. It is class government in a crude state, which, in the ultimate is tyranny.

On the other hand, it is equally unjust, for the same reason, for the employer to seek to prevent his employees from following freely their right to organize and to bargain collectively, provided their purposes are legal. The right to organize for self-betterment is clear; but organization for the purpose of coercing another into doing that which he has a right to refuse to do, is illegal.

The employer frequently resorts to the courts; labor but seldom. The power of brawn has been labor's chief weapon. But the time may come when the unions will find it expedient to adopt "quality" as their motto and slogan; when to be a member of a trade union will mean that the man is qualified and skilled in his trade, and has had to stand a strict test of his qualifications in order to become a member of the union, and that he stands ready to render a fair day's work in the exercise to the full of his skill. When the unions stand solely for ability and honesty in their several callings, employers will, for their own welfare and protection, seek them out, and require none but union labor.

As the situation stands today, the position of neither side appeals to the unbiased mind. In other words, neither side seems to be trying to do the fair thing. Said the Court in the case mentioned above: "Labor has not as yet appealed to the courts, but if the present 'employer's closed shop' movement has for its ultimate object the overthrow and destruction of organized labor—an ulterior and unlawful object—and, by means as unworthy as those here reprehended, capital is certainly extending the invitation."

The Cyrus Currier case, supra, involved the improper solicitation of the complainant's employees to join the defendant union. The facts showed that plaintiff made it a condition of employment that his employees should not join the union. Upon their joining, his custom was to discharge them. The Court found that the labor union solicited plaintiff's employees by persuasion, and in some cases by force and violence, to join the union, with the intent to have them break their contracts of employment.

The Court clearly states the rights of the respective parties as follows: "The complainant asks more: That the defendants be restrained from soliciting the complainant's employees to join the union with intent to have them breach their contract of service. I am of the opinion that it is also entitled to this relief. It is the complainant's legal right to hire men unaffiliated with labor unions, and to make continuance of unaffiliation a condition of the employment. That is as assured to the employer as is the right of the unions to make it a condition of membership that their members shall not work in shops where non-union men are employed. And it is the master's legal right to have his servants abide with him, free from interference of the union, as it is the right of the union,

to prosper unmolested by the employer. The right of each to lawfully prosecute his affairs is equally within the protection of the law, and if in their competition for labor harm falls to one from the lawful promotion of the other's business the injury is an inevitable incident, legitimately inflicted and excusable. So long as each keeps advancing his interest without purposely intending to harm the other, there is no room for complaint or cause for action; but when either converges the line of advance in assault upon the other, then the law, through its courts, calls a halt by injunction. In other words, in their progress they must not step on the other's toes with intent to injure."

A much similar decision was rendered by the Supreme Court of the United States in Hitchman Coal & Coke Co. v. Mitchell (245 U. S., 229), Mr. Justice Pitney writing the opinion, upon which the Court of Chancery of New Jersey chiefly relies.

NOTES OF IMPORTANT DECISIONS.

PAYMENT OF STAMP TAX AS CONDITION PRECEDENT TO TRANSFER OF STOCK.—Holding that payment of the stamp tax required by §§ 270-278 of the New York Tax Law, is not a condition precedent to action to compel a corporation to transfer corporate stock on its books, the New York Court of Appeals in, Luitwieler v. Luitwieler Pumping Engine Co., 132 N. E. 401, said:

"We held in Bean v. Flint, 204 N. Y. 153, 97 N. E. 490, that the payment of the stamp tax required by §§ 270-278 of the Tax Law does not create a condition precedent and that the failure to pay the tax is a matter to be pleaded as a defense. Nothing can be added to what Hiscock, J., said in that case. We think the rulings below are contrary to the rule there laid down. As stated, no such defense was pleaded, a motion to amend the answer so as to set up a defense was withdrawn, and the certificates of stock and transfer to the plaintiff were kept in the evidence by the statement of counsel that he withdrew his motion to strike them out. Under such circumstances we think, upon the proof as offered, the court could have granted judgment for the plaintiff directing a transfer upon the books of the company when the certificates were presented properly stamped or upon payment of the tax. Phelps-Stokes Estates v. Nixon, 222 N. Y. 93, 118 N. E. 241; Waddle v. Cabana, 220 N. Y. 18-27, 114 N. E. 1054.

"The object of all these tax provisions is to get money for the state. When the only question presented is the right to have stock transferred upon the books of a corporation, the state is fully protected, if the stamps are annexed or the tax paid at or before the time the transfer is made."

STATUTE PROHIBITING STRIKES HELD VALID.—The case of People v. United Mine Workers of America, Colo., 201 Pac. 54, holds valid a statute prohibiting strikes and lockouts in industries affected with a public interest during an investigation, hearing, or arbitration of a dispute by the Industrial Commission. The case holds, too, that coal mining is an industry affected with a public interest. In part the Court said:

"Then, too, a business by circumstance and in its nature may arise from a private to a public concern. German etc., Co. v. Kansas, 233 U. S. 411, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189, and since the decision of the Morgan case (1899) the rapid development of the relations of the coal miners, the coal operators, and the public have produced a situation very different from that which then existed. Because of these considerations we do not think that the Morgan case controls this one. * * * One reason for holding a business to be affected with a public interest is that it is a practical monopoly. German etc., Co. v. Kansas, 233 U. S. 389, 416, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189; Budd v. New York, 143 U. S. 517, 537, 12 Sup. Ct. 468, 36 L. Ed. 247; Nash v. Page, 80 Ky. 539, 545, 44 Am. Rep. 490.

"There can be no question that the production of coal is, at the present time, affected with a public interest to a certainty, and an extent not less than any other industry; consequently coal mining is within the terms of chapter 180, S. L. 1915, and it follows that that satute does not violate any constitutional provision as to due process or liberty of contract, as appears from the cases cited above.

"There is no involuntary servitude under this act. Any individual workman may quit at will for any reason or no reason. There is not even prohibition of strike. The only thing forbidden is a strike before or during the Commission's action.

"It is objected that section 33 of the act in question, forbidding incitement to lockout or strike, violates article 2, § 10, of the state constitution, concerning freedom of speech; but, if the legislature has power to forbid anything, it has power to forbid incitement thereto. See R. S. 1908, § 1620, on accessories."

LIABILITY OF A STATE DEPARTMENT EX DELICTO.

That the principle of the common law "The King can do no wrong" is still active, was very strikingly brought out in the recent case of Macgregor v. The Lord Advocate.[1] We propose to detail the principles of that decision as its references to the liability of State Departments may be not without interest to practitioners elsewhere.

The plaintiff (or pursuer to use the Scots law term) brought an action against the Lord Advocate as representing the War Department and against Robert Macfarlane, sergeant, 614 Motor Transport Company, Royal Army Service Corps, concluding for payment of £2100 by the defenders conjunctly and severally, as reparation for personal injuries sustained by him through being run down by a motor car belonging to the War Department, and driven in the course of his duty by the other defender. The pursuer averred that he was run down through the fault of the defender Macfarlane, a servant of the War Department.

The Lord Advocate, as representing the War Department, pleaded that the action, insofar as laid against him, should be dismissed as incompetent.

This plea was based on the constitutional principle that a department of state cannot be sued in an action claiming damages for a wrong. Each department of state, it was said, is a branch of the Government; the Government, constitutionally, is the sovereign, and the sovereign can do no wrong, personally or by any of his Ministers, cognisable in a court of law.

It was conceded by the pursuer's counsel that this constitutional principle is recognized in England.[2] Redress, in England, may be had by a subject against the Crown, only where the claim is for implement of a contract, or for damages in respect of breach of contract,[3] and then the subject must proceed, not by ordinary action, but by petition of right.

There is no reference to this question in any of the institutional treatises on the law of Scotland, nor is there any Scottish case which expressly decides the point maintained by the Lord Advocate. There are, however, judicial dicta which support the view contended for on behalf of the War Department. In the case of Smith,[4] a bombardier raised an action against the Lord Advocate, as representing the War Department, in which he concluded, inter alia, for damages in respect of wrongful acts of a court-martial by which he had been tried. The action failed, and the Lord Ordinary (Kincairney) in dealing with the claim for damages said at p. 121: "There remains the conclusion for £750 as damages for the wrongs which the pursuer has suffered through the illegal convictions of which he complains. Now, on this point, the question does not arise whether this Court could set aside the decrees of the court-martial complained of as ultra vires or incompetent. I am disposed to think that it could not. But I am not asked to interfere in that manner, for these illegal proceedings have already been set aside by competent military authorities. The pursuer does not challenge the proceedings of the military authorities, but rather founds on them, and maintains or may maintain that they prove conclusively that he has suffered a legal wrong. But the question is whether he can make any claim against the War Department for that wrong. He might probably have sued those members of the court-martial who did the wrong, if it could be shown that their proceedings were incompetent

(1) 1921, 2 S. L. T. 174.

(2) Feather, 6 B. & S. 257. Tobin, 16 C. B., N. S. 310; Canterbury, 1 Phillips 321; Addison on Torts, 8th ed. 140; Beven on Negligence, I. 217, 220.

(3) Thomas, 1874, L. R., 10 Q. B. 31; Windsor & Annapolis Railway Co., 1886, L. R., 11 A. C. 607.

(4) 25 R 112.

or ultra vires. But I am unable to see on what principle the War Department can be made liable. There is no authority for the proposition, that when a court falls into error or acts incompetently or exceeds its jurisdiction, any department of the state can be made answerable. There is no reason why there should be such liability for the errors of courts-martial more than the errors of other civil or criminal courts. It is said that the War Department is liable for the faults of the officers who formed the courts-martial as being the servants of the War Department; the answer is that they were not the servants of the War Department but the servants of the Crown; and, if it be said that this action, although nominally against the War Department, is really against the Crown, the conclusive answer appears to be that the Crown cannot be sued for wrong done by itself or its servants.

"It is settled, indeed, that an action will lie against the Crown on a contract entered into by the servants of the Crown, or for breach of contract by the servants of the Crown.[5] In these cases it was, I think, clearly recognised that the Crown could not be made liable in damages for wrong or delict or quasi-delict. Nor, it is thought, can it be liable where the damage has arisen from the negligence of the servants of the Crown.[6] Questions of delicacy may arise in applying this principle, but I am unable to think that there is any doubt that neither the Crown nor any public department can be made liable for the blunders of a court or of the officers supposing themselves to form a court or of the Commander-in-Chief of the forces in India.

"On the whole I am satisfied that the present case cannot be supported in any of its parts and that the defender is entitled to absolvitor." The Second Division adhered, and Lord Young, at p. 123, made these observations as to the conclusion for damages: I omitted to refer to the conclusion for damages. What I have to say upon that is, that while any servant in the public service may have an action for damages against any individual who has done him a wrong, even in connection with military service, I know of no authority for a claim of damages against Her Majesty's Government, or any public department of Her Majesty's Government. Any individual in the public service may so treat another as to subject himself personally in damages, and the damages may be recovered in a court of law, but there is no authority for an action against the Government or a public department of the Government, which is the same thing, for all the departments of the Government just constitute the Government as representing Her Majesty."

In the case of Wilson,[7] in which a regiment of volunteers and its commanding officer were sued for damages in respect of the death of a child killed by an ammunition wagon, the Lord Ordinary (Kyllachy) said, at p. 170:

"In this case I have come to the conclusion that the action cannot be sustained as against Colonel Mackay, as representing the volunteer regiment, and as holder and administrator of funds. These funds belong to the Government — that is to say, the Crown—and it is, I think an accepted doctrine that the Crown cannot be liable or sued for damages in respect of the 'torts'—the wrongful act of its officers. I therefore propose to dismiss the action so far as directed against Colonel MacKay as representing the regiment."

This part of the Lord Ordinary's decision was reversed, but the general proposition laid down by the Lord Ordinary was not challenged.

(5) Thomas v. The Queen, 10 Q. B. 43; Windsor Railway Co. v. The Queen, L. R. 11 App. Cas. 614.

(6) Viscount Canterbury v. Attorney General, 1842, 1 Phillip Ch. Cas. 306; Lord Advocate v. Hamilton, 29 S. L. R. 213.

(7) 7 F. 168.

The Court followed the English decisions and the dicta in the Scottish cases referred to, with the result that the pursuer's claim was dismissed. It is interesting to note that when delivering judgment, Lord Salvesen, one of the strongest judges of the Inner House, made the following observations:

"If this question were open the argument for the reclaimer (pursuer) would be almost irresistible. No reason has been suggested why a department of state should not be answerable, like a municipal corporation, or any ordinary employer, for the conduct of its business. The present state of the law, as it has been settled in England, does not appear to me to be satisfactory, because it leaves it in the option of a department to accept liability where it pleases, and to repudiate liability where pressure is not brought upon it, possibly from political sources, to accept liability. I do not think it is desirable, from the point of view of public policy, that a department should be in that position, and it may well be that the present state of matters ought to be the subject of legislative amendment.

"Treating this as a pure question of the common law of Scotland, however, I think it is settled by authority. The law of England seems to have been settled for a long period, and it is substantially to the effect that, while the Crown may, after certain procedure, be sued for breach of contract, it cannot be sued for the negligence of a servant of the Crown. Authoritative pronouncements in Scotland are extremely meagre; but, such as they are, they seem to have followed the English rule, that rule being originally derived from a doctrine that is no longer accepted, viz., the doctrine that the King can do no wrong."

DONALD MACKAY.

Glasgow, Scotland.

THE DUTY AND RESPONSIBILITY OF THE BAR IN THE SELECTION OF THE JUDICIARY.

Not least in importance among the duties and responsibilities of the Bar is the education of the electorate to a realization of the truth that learning in the law is indispensable and that no amount of popularity or good intentions can be a substitute. This education of the people is only practicable by means of constant and systematic propaganda. All classes should have deeply impressed upon their minds, first, that the courts afford the only effective and real protection or security for their personal liberty and their property; secondly, that this can only be maintained if justice be administered competently, uniformly, consistently and impartially and always according to the law, and, thirdly, that a judge who has a mere smattering of law is dangerous to any community, for half-knowledge is frequently worse than ignorance.

A special and urgent duty of education and propaganda rests upon the Bar of the present generation. Women recently enfranchised now constitute more than one-half of the voters of the country, and they have little, if any, tradition of what I shall term the political instinct to guide them. It is not an exaggeration to say that women voters generally have no definite conception of the vital importance to all classes of expert service on the bench and of adherence by our judges to the settled rules of law. It is easy for men and women to grasp the idea that a judge should be honest and impartial; that is instinctively realized. But few have any conception of the truth that justice according to law is what all must strive to secure and uphold as distinguished from what is expressed in such catching phrases as "Justice without law," or "Justice without regard to the technical rules or precedents of the past."

Another consideration which is peculiar to our own day and has greatly increased

the duty and responsibility of the Bar in the selection of judges is the introduction of the primary system of direct nominations. Mr. Chief Justice Taft declared in an address several years ago that "Of all the evils which are supposed to be a cure for all evils, the direct primary is the worst. * * * As an example of what the primaries can do, I will say that they have already seriously impaired the standard of the judiciary."

There can be no doubt that the qualities required in a candidate for judicial office should be knowledge of the law, love of justice, probity, impartiality, independence and dignity, and that mere popularity, or what is so often necessary to popularity, good-fellowship, is the last quality we look for in a judge. The self-seeker and self-advertiser—the man who will go around soliciting signatures to a nominating petition and then campaign for support in the primaries, is seldom qualified by temperament or character for judicial office and seldom has the self-respect and dignity which we expect in a judge.

Before a judicial candidate can be intelligently and wisely selected, there should be a most thorough investigation and exchange of views as to his professional scholarship and repute, his practical training and experience and his character; the question of his popularity should only be secondarily considered, if at all. A proper test is much more likely to be applied when there is responsible party government and nomination by an executive directly responsible to the people or by a majority of responsible representatives present in a public convention and discussing and debating, if need be, the relative merits of candidates. Such investigation and discussion before the filing of designating certificates is seldom practicable under the direct primary system, particularly in populous communities.

In the State of New York the direct primary system has been in operation for ten years as to justices of the State Supreme Court and eight years as to judges of the Court of Appeals, and its practical operation has been unsatisfactory. It has also compelled greater activity on the part of the Bar in order to secure the renomination of judges who had competently and satisfactorily served an elective term and the selection and nomination of lawyers of learning, experience and character.

The election law of New York provided that, in order to become a candidate of any party for the office of judge of the Court of Appeals in the state-wide primaries, designating petitions had to be signed and acknowledged by at least three thousand enrolled voters of the particular party, and to become a candidate for the office of justice of the Supreme Court in any one of the nine judicial district primaries, designating petitions had to be signed and acknowledged by at least fifteen hundred enrolled party voters.

It had long been the general policy of the Bar of the State of New York to urge and support the renomination and re-election on a non-partisan basis of all judges who had competently and satisfactorily served an elected term and who had upheld the independence, dignity and prestige of the Bench. This policy had tended to promote independence and impartiality in our judges, and to make them feel that their renomination and re-election would depend only upon the character of the judicial service they rendered and that they would not have to look to political organizations or groups for renomination if they desired to continue in judicial office. Public opinion, stimulated in greatest measure by the Bar, had impelled the two great parties to unite in the renomination of satisfactory judges, irrespective of party affiliation, although there had been some exceptions.

Under the new law, however, political conventions could not renominate; and, if a non-partisan renomination of a particular judge were deemed desirable, this meant that at least six thousand signatures had to be obtained in the case of a judge of the

Court of Appeals and three thousand in the case of a justice of the Supreme Court, simply in order to secure the printing of the candidate's name on the official primary ballots of the two great political parties. The labor of securing these signatures to nominating petitions and the expense for printing, notaries' fees, etc., were considerable, and, of course, no self-respecting judge would undertake to solicit signatures for renomination, or be willing to place himself under obligations to any one, even if he could personally afford the expense necessarily attending primary campaigns.

It was therefore realized that the new system imperatively imposed upon the Bar the duty to see to it that the necessary funds were raised by voluntary contributions and that the requisite signatures were obtained in order that the name of a judge whose renomination was desired might appear upon the official primary ballots. This meant that year after year, as long as the primary system continued, the Bar had to organize months before the primaries were held, prepare and print nominating petitions, and at great labor and expense obtain the necessary signatures. In fact, during the ten years that the direct primary system was in operation in the State of New York, the Judiciary Committee of the Association of the Bar of the City of New York was called upon, each time the renomination of a satisfactory judge was desired, to organize the machinery for securing the signatures of thousands of duly enrolled voters and employ notaries to solicit signatures at considerable expense, and the supervision of this work required months of preparation and constant attention by the Judiciary Committee, notwithstanding the fact in some instances that there was no doubt of the general desire to re-elect particular judges upon a non-partisan basis and thereby ensure their continuance on the Bench, and that the political leaders were agreed that this should be done.

Many thoughtful observers among the members of the New York Bar became convinced that the practical operation of the direct primary system had refuted the assumptions, hopes and promises with which the advent of this so-called reform had been urged and heralded. It had been assumed, in the face of all practical experience to the contrary, that if the voters had direct power, and other methods of nominating candidates were abolished, they would perform their political duties more actively, that better qualified and more competent and independent candidates would then offer themselves or somehow would be brought to the attention of the electorate, and that nominations would then represent the choice of the majority in each party, and not that of minorities or of political bosses. How the majority were to ascertain the qualifications of possible candidates in populous districts, or co-operate to secure the nomination of the best qualified, was left quite in the air. It seemed to be conceived that the people would instinctively seek and by some process of political inspiration would intuitively discern and select for public office the best qualified persons in the community.

In populous constituencies, such as the State or City of New York, with hundreds of thousands of enrolled voters, it seems almost unreasonable to have expected that the direct primary system would be more likely to secure competent and trustworthy candidates than the old method of nominating at public conventions composed of responsible representatives of the voters from each election district. In the State of New York the result of the direct primary system has not only been to increase the power of the so-called political machines and the bosses, but to render them irresponsible and to impair party discipline. If an unfit and improper nomination is made, the leaders can disclaim responsibility by pleading that the primary had declared the will of the majority.

In the face of this practical experience and a fair and sufficient trial of the direct primary system, the New York legislature has this year wisely concluded that the best and permanent interests of the State would be promoted by restoring the nominating convention for state officers, including judges of the Court of Appeals and justices of the Supreme Court, and accordingly this was so enacted.

It was undoubtedly true that there had been grave abuses in the convention system, that conventions at times had been improperly conducted, and that the scandals in connection with contested seats had become intolerable. But there had been no form of abuse that could not have been remedied by appropriate legislation. Moreover, the control of nominating conventions was at all times in the hands of the majority of the voters if they would only take the trouble to enroll and vote at the primary elections for competent and honest delegates. The rights of delegates could readily have been safeguarded by law, and the abuses arising from contested seats could have been prevented by giving the certified delegates an absolute right to their seats subject to review only by the courts, as has been done in the New York legislation enacted this year.

In final analysis, there will be found to be no protection or remedy against fraud or corruption in nominating candidates for public office equal to the participation in politics of the majority of voters as an imperative duty of citizenship. Our political rights cannot be preserved except by our own active and constant vigilance. In this respect we get just what we deserve. The idea that the direct primary would in and of itself tend to stimulate greater participation in nominations or to eliminate the professional politician or the boss has been shown to be erroneous in almost every State where the scheme has been tried. In fact, quite the contrary has been the ultimate result in many instances, and it may truly be said that the present condition of nominating machinery under direct primaries is in practice and result much more objectionable than the old system.

The great public service rendered by the Chicago Bar Association in connection with the elections held last June shows quite conclusively the useful public service that can be rendered and the controlling influence that can be exercised by Bar Associations. The success of the movement initiated by the Bar of Chicago was complete, astonishing and inspiring, and their example should be emulated. The twenty candidates for judicial office who were endorsed by the Bar of Chicago were elected and most of them by majorities of over 100,000 votes. The Bar of that city was assessed for the necessary expenses of this campaign, and it voluntarily raised and expended a fund of more than $100,000. The whole campaign was fought on the highest plane, and the issue was the protection of the Bench from possible domination by and subserviency to any political organizations.

The Association of the Bar of the City of New York has long had a standing committee known as the Committee on the Judiciary, and the jurisdiction and duties of this committee are prescribed in the by-laws as follows:

"A Committee on the judiciary, which shall consist of nine members. It shall be charged with the duty of observing the practical working of the courts of record, both civil and criminal, and of making such recommendations to the Association with respect thereto as it may deem advisable.

"It shall consider the fitness of candidates nominated or proposed for election or for appointment to judicial office or to any office connected with the administration of justice in the courts of record, and shall confer on that subject with other organizations, and with nominating conventions or

committees, and, in the case of candidates for appointment to any such office, with the public officer in whom the power is vested, and shall recommend to the Association, at a special meeting or otherwise, such action in respect to candidates as it may deem advisable."

This committee has systematically investigated the administration of justice in the City of New York, the character of the judicial service rendered by judges, and the qualifications of candidates for judicial offices, reporting from time to time to the Association. It has been constantly active, always ready to hear and investigate complaints, and before each election has carefully reviewed at length the training and qualifications of candidates and made appropriate recommendations, which have generally been approved and endorsed by the Association.

The work of such a committee in large centres must be at times quite laborious and engrossing; and it must always be a difficult and delicate task for lawyers to pass in judgment upon the fellow-members of our profession. The performance of such a duty unfortunately but inevitably invites bitter resentments, unwarranted attacks and unfounded challenges of motives, and it creates deep and lasting enmities. Constant resoluteness of purpose is called for in order to resist appeals of friendship and disregard the probability or the menace of attempted reprisals. The duty, however, must be performed and by the Bar, and it must not be shirked. There is no substitute. No other body of citizens is equally qualified. The sole consideration must be the best and permanent interest of the public, and the standard of performance must be a courageous, unshakable and uncompromising determination to seek the truth and to be just, fair and impartial.

It is urged that every Bar Association should have its Committee on the Judiciary; it should charge that committee with the constant duty of investigating the practical administration of justice and the qualifications and services of the judges, and it should publish reports as to the qualification of candidates for judicial office, so that the public may be informed of their fitness or unfitness. No higher or more essential service can be rendered to any community. The vigilant activity of a united Bar will be practically controlling in most instances, and the profession can never exercise a greater influence for the public good than when thus placing its organized strength, its collective action, its vivifying *esprit de corps,* at the service of the State. Let the Bar do its full duty and inculcate an appreciation of the practical value and moral grandeur of the public service rendered by our judges, and the people will respond to its efforts and leadership if satisfied that its members are striving unselfishly and consistently for a competent, independent and incorruptible judiciary.

Whether we have the appointive or the elective system, the paramount duty and responsibility of the profession is clearly to co-operate in securing the appointment or nomination of properly qualified lawyers to judicial office and in unitedly and steadfastly opposing the appointment or nomination of those who have not the necessary fitness. Seldom will it be that an executive officer will appoint or that political parties will nominate for judicial office an unfit candidate in defiance of the objections and protests of a united Bar. Either system will work satisfactorily if the profession will do its duty in this matter, and, exerting its influence constantly and unitedly to the utmost, uncompromisingly insist that competency, experience and character shall at all times be the controlling factors in the selection of our judges.

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HIGHWAYS—STATUTORY REGULATION OF MOTORIST.

SCOTT v. STATE.

233 S.W. 1097.

(Court of Criminal Appeals of Texas. Oct. 5, 1921.)

Vernon's Ann. Pen. Code Supp. 1918, art. 820M, compelling the driver of an automobile striking a person to stop and render assistance, must be construed to mean that the party shall render all the aid which would reasonably appear to him as an ordinary person at the time to be necessary, and when so construed is valid.

HAWKINS, J. Appellant was convicted under a prosecution based on article 820M, Vernon's P. C., and his punishment assessed at a fine of $100 and 90 days' confinement in the county jail.

No statement of facts accompanies the record, and the case is presented here on the sole question as to whether said article is sufficiently specific in defining the offense sought to be denounced. In 1917 the Legislature passed an act which has sometimes been called the "Highway Law," but more properly speaking one "Regulating Operation of Motor Vehicles." This law was amended at the same session, and again in 1919, and with these amendments is brought forward in Vernon's P. C. as articles 820A to 820Z. We have already had occasion to review this law, upholding some of the provisions, and holding article 820D, relating to glaring headlights, void for indefiniteness (Griffin v. State, 86 Tex. Cr. R. 498, 218 S. W. 494), and also that a portion of subdivision (a), article 820K, is likewise inoperative and unenforceable in a criminal proceeding for the same reason (Russell v. State, 228 S. W. 566).

We quote so much of article 820M as may be necessary, deleting for convenience the portions not here required:

"Whenever an automobile strikes any person, the driver of, and all persons in control of such automobile, shall stop, and render to the person struck all necessary assistance, including the carrying of such person to a physician or surgeon for medical or surgical treatment, if such treatment be required, or if such carrying is requested by the person struck."

Appellant was charged under this law. If the law can be held good, the indictment is sufficient.

Counsel for appellant, in his brief, admits the article is commendable in purpose. This is true with reference to the whole of the act in question. Not until 1917 did our Legislature undertake general legislation on the subject, but in many states the necessity for statutory enactments to supplement the common-law rules was recognized many years before. With the constantly increasing use of motor vehicles both for business and pleasure purposes, the demand for road regulations in their use has become imperative. The driver who may strike a person or vehicle today may tomorrow himself be the victim.

The general rule for the construction of statutes, of course, applies, and has been recognized not only by the courts of our own but of other states, as well as by the textwriters on motor vehicles.

The following quotation is from Black's Interpretation of the Law, § 115, and is copied as section 130, p. 93, in "The Law Applied to Motor Vehicles," by Blakemore:

"Statutes enacted by the Legislature in the exercise of police power, for the promotion of preservation of the public safety, health, or morals, may sometimes impinge upon the liberty of individuals, by restricting the use of their property, or abridging their freedom in the conduct of their business. When this is the case, such statutes ought always to receive such a construction as will carry out the purpose and intention of the Legisature with the least possible interference with the rights and liberties of private persons;" such enactments having "designed to further the general welfare by derogating from the liberty of a few."

Since motor vehicles have become a common means of travel upon the public highways, many statutes have been enacted in an effort to protect the public health and safety from the consequences of the use of automobiles upon the roads and streets. Some of these statutes have been assailed upon the ground that they manifested an exercise of power not inherent in the legislative department of the government, and others have been attacked upon the ground that in them are found unreasonable requirements. Ruling Case Law, vol. 6, p. 397; Berry on Automobiles, § 1601; Ex parte Parr, 82 Tex. Cr. R. 528, 200 S. W. 404; State v. Mayo, 106 Me. 62, 75 Atl. 295, 26 L. R. A. (N. S.) 502, 20 Ann. Cas. 512; People v. Rosenheimer, 209 N. Y. 115, 102 N. E. 530, 46 L. R. A. (N. S.) 977, Ann. Cas. 1915A, 161; State v. Sterrin, 78. N. H. 220, 98 Atl. 482.

In some of these decisions, statutes requiring that one causing an injury by collision with an automobile shall do some affirmative act,

act, such as furnishing information showing his name and address, have been upheld.

We have just recently received a supplemental brief from appellant, citing the Russell Case, supra, and urging that it and the Griffin Case, supra, and other authorities cited by him, are decisive of this case. In the subsequent discussion we are not unmindful of the principles upon which these cases were disposed of, but have reached the conclusion that the law in question can be upheld without doing violence thereto.

A party operating an automobile which may injure another in collision ought to be impelled by humanitarian motives, in the absence of any law, to tender aid in an effort to minimize the result of the injury. In doing this he would naturally and instinctively do the thing which to him under the circumstances, appeared to be proper and necessary to alleviate suffering. If his own car was uninjured so that it might still be operated, perhaps the most natural thing for him to do would be to try and get the injured persons to a physician or surgeon as quickly as possible.

The statute ought not be given such a construction as would or might result in manifest harm to a person accused of violating it. It would be impracticable for the Legislature to undertake to say that in a certain kind of accident this particular kind of aid should be extended, and in another accident aid of some other character would be proper. Every case must be governed by the circumstances attendant upon it. What would appear to be "all necessary aid" in one case might not so appear in the next one, likewise it might reasonably appear to be necessary to get the injured person to a physician or surgeon for treatment in one instance and not in another; hence the fact that it would be futile for the lawmakers to undertake to be specific in particularizing what aid should be rendered becomes apparent. That the statute contains a humane provision cannot be gainsaid If it can be construed to require that to be done which ought to be done even in the absence of the law, and without hurt to the individual, it ought, as so construed, to be upheld.

It would be manifestly unfair in measuring the extent of the aid rendered to have the court or jury pass upon that issue in the light of developments subsequent to the time of the accident. An injury might appear slight at the time, suggesting little necessity for aid of any kind, but internal injuries of serious nature might develop later. An accused could not be held criminally liable for a failure to do what was not reasonably apparent to him as necessary at the time. One acting in apparent necessary self-defense does so from what appears to him, viewed from his standpoint at the time, with all the facts and circumstances within his knowledge, and not from the viewpoint of somebody else, or the jury, in the light of subsequent events.

We have reached the conclusion that a fair and reasonable construction of the statute in question is that the party should render all the aid which would reasonably appear to him as an ordinary person at the time to be necessary, including taking the injured persons to a physician or surgeon, if so requested by them or if it reasonably appears to accused that medical treatment be necessary. We think the word "required" in the connection used means only "necessary." The jury ought to be so instructed (if it be an issue) that, if accused gave all the aid which under the circumstances reasonably appeared to him to be necessary, he should be acquitted, and that, if under all the circumstances it did not reasonably appear to him to be necessary to carry the injured parties to a physician or surgeon for treatment, he could not be convicted for a failure to do so, unless he was requested by them to be so taken, and declined.

We can perceive no violence to the general rule of construction in reaching this conclusion. No new provision has been read into the law. We only construe what "all necessary aid" means in the statute, and say it must be determined from an accused's standpoint as to how much and what character of aid appeared to be necessary under any given state of facts. Surely the driver of an automobile should have no trouble in understanding in advance that in case of an accident he was expected and required to do what appeared to him to be necessary to alleviate suffering.

We think no error was committed by the trial judge in overruling the motion to quash the indictment and in arrest of judgment, because of the matters urged against the sufficiency of the statute in question.

Appellant complains that the indictment is defective in not alleging that accused "knowingly" struck the party injured, or that, "knowing" he had struck him, he failed to stop and render aid. We cannot agree to this contention. The word "knowingly" or "knowing"

does not appear in the description of the act denounced as an offense, and it is not necessary for the state to so allege. If it becomes an issue on the trial, lack of knowledge on the part of a defendant that he had injured someone would excuse him and be a defense to a prosecution under the article in question. The trial judge recognized this as the law, and submitted that issue to the jury.

Believing the article of the statute should be upheld as construed in this opinion, the judgment of the trial court is affirmed.

NOTE—*Validity and Construction of Statute Requiring Motorist Striking a Person to Render Assistance.*—Statutes have been held valid which require the driver or owner of an automobile, in case its operation causes injury to person or property, to stop and give his name and address and other information, to the person injured in person or property, or to some other suitable person, and to render assistance to the injured. Woods v. State, 15 Ala. App. 251, 73 So. 129; People v. Fodera, 33 Cal. App. 8, 164 Pac. 22, rehearing denied by Supreme Court; People v. Finley, 27 Cal. App. 291, 149 Pac. 779; State v. Sterrin, 78 N. H. 220, 98 Atl. 482.

A statute which makes it a crime for the driver of a motor vehicle, or of any other vehicle, and the person, if any, therein having control over the driver, in case of a collision with any person or vehicle, to refuse to stop and render to the person struck, or to the occupants of the vehicle collided with, all necessary assistance, and to give such injured person or persons the number of his vehicle, his name and address, and the name of the owner of such vehicle, is not violative of the constitutional provision that "no person shall be compelled, in any criminal case, to be a witness against himself." Woods v. State, 15 Ala. App. 251, 73 So. 129; People v. Diller, 24 Cal. App. 799, 142 Pac. 797; Ex parte Kneedler, 243 Mo. 632, 147 S. W. 983, Ann. Cas. 1913C 923.

"*In each of these cases* it is pointed out that the operation of an automobile upon the public highways is not a right, but only a privilege which the state may grant or withhold at pleasure, and that what the state may withhold it may grant upon condition. One condition imposed is that the operator must, in case of accident, furnish the demanded information. This condition is binding upon all who accept the privilege. The defendant also claims that the statute is unconstitutional, in that it requires him to furnish evidence which might be used against him in a criminal proceeding. Bill of Rights, art. 15. The same question has been raised in other states, and in each the conclusion has been reached that the statute is valid." State v. Sterrin, 78 N. H. 220, 98 Atl. 482 (1916).

Further, see Berry, Automobiles (3d ed.), secs. 57, 1601.

ITEMS OF PROFESSIONAL INTEREST.

THE PROPER PROCEDURE UNDER EQUITY RULE 29 TO TEST AUTHORITY OF ATTORNEY TO REPRESENT PLAINTIFF.

Rule 29 of the new Federal Equity Rules, promulgated by the United States Supreme Court at the October term, 1912, reads as follows:

"Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered."

This rule is almost identical with Equity Rule 32 of the Supreme Court of the District of Columbia adopted in 1909. The question which this paper will discuss is whether under the above rules the motion to dismiss is a proper proceeding to test the authority of an attorney representing the plaintiff. A brief analysis of Rule 29 will enable us to settle the question more readily. By the effect of this rule:

(1) Demurrers are abolished. Pleas are abolished.

(2) Defense in point of law arising upon the face of the bill heretofore made by demurrer or plea shall be made by (a) Motion to dismiss, or (b) In the answer.

(3) Defenses heretofore presentable by (a) Plea in bar, (b) Plea in abatement, shall be made in the answer. (Discretion of court to hear separately.)

(4) Motions to dismiss may be set down for hearing.

From the above analysis it is clear that if it were possible before the rule was adopted, either by a plea in bar or by a plea in abatement, to raise the question of the authority of the attorney to represent his client in a suit, then that question should be raised by the

defendant in his answer. If, on the other hand, before the adoption of the rule, the question could not have been raised in a demurrer, then it now may be taken advantage of either in a motion to dismiss or in the answer. It becomes necessary, therefore, to ascertain by what method, previous to the adoption of Equity Rule 29, the authority of counsel to institute a suit might be questioned.

Since attorneys are officers of the court, there is a firmly established presumption in favor of an attorney's authority to act for any client he professes to represent, and, therefore, ordinarily it is unnecessary for an attorney to show his authority.[1] But, on account of the relation of the court to its attorneys, who are its officers, and the power which it has over them, it can, if the facts submitted warrant it, call upon a plaintiff's attorney in any suit to show his authority.[2] And so it has been held that either party to a suit may question an attorney's right to appear.[3]

However, as the objection to an attorney's authority to appear is of a dilatory character, such objection must be made at the first opportunity.[4] It has been held that after answer had been filed and the case called for trial, it was too late for defendant to demand that the plaintiff's counsel produce his authority for appearing.[5] *Sed quaere.*

When we come to ascertain the methods employed in raising the question of an attorney's authority to represent his alleged client, it has been held that such a question cannot be raised by demurrer to the complaint.[6] Nor can it be presented in a plea,[7] or raised collaterally or in the answer.[8] The proper method is set out by Delaney, District Judge, delivering the opinion of the court in Bonnifield v. Thorp:[9]

"The practice is also well settled that the authority for an attorney to appear cannot be called into question except by a motion directly for that purpose, based upon affidavits, showing in the first instance *prima facie* a want of authority; and, upon the hearing, such want must be established by clear and positive proofs. The proceeding may be by motion to vacate the appearance, to dismiss the action, or for an order requiring authority to be shown; and in cases where the validity of an order, judgment or decree depends upon the jurisdiction of a court over the person of a party, acquired solely by an appearance of attorneys, the authority of such attorneys may be attacked upon a motion to vacate the order, judgment or decree. In the absence of some such proceeding, directly challenging the authority, the court will not hear or inquire into the question of the authority of the attorney for his appearance."[10]

The rule is thus stated in Cyc.:[11]

"The question of an attorney's authority to represent an alleged client cannot, it has been held, be raised collaterally, or on a demurrer, nor should it be set up in a pleading, but must be raised on motion directly for that purpose, and supported by affidavits."

And in Story's Equity Pleading it is stated as follows:[12]

"When the plaintiff in a suit at law is a fictitious person, the defendant may plead it in abatement. In equity a different and more summary course is adopted, and upon motion the court will direct a stay of the proceedings, or that the bill be taken off the files, and will order the solicitor to pay the costs for his contempt in instituting the suit. If the name of a complainant should be used without his authority, a similar course would be pursued."

Thus it will appear that, independently of the above rules, it is improper to raise the question of an attorney's authority to represent his client by demurrer, plea or answer. The reason for this seems clear, especially in the case of an attorney representing the plaintiff. It is in the nature of a dilatory question which, under the civil law, would be raised

(1) 6 C. J. 635, 4 Cyc. 928, and cases cited.

(2) New York City and County Com'rs v. Purdy, 36 Barb. 266; Hollins v. St. Louis & C. R. Co., 57 Hun 139, 11 N. Y. Supp. 27, 25 Abb. N. C. 93; Vincent v. Vanderbilt, 10 How. Prac. 324, 1 Abb. Prac. 193; Ninety-Nine Plaintiffs v. Fame, 11 N. Y. Super Ct. (4 Duer) 632.

(3) People v. Mariposa Co., 39 Cal. 683; In re Gillespie, 11 Tenn. (3 Yerg.) 325.

(4) Miss v. People, 116 Ill. 265, 4 N. E. 783; Rogers v. Commelin, Fed. Cas. No. 12,000.

(5) Roland v. Gardner, 69 N. C. 5[illegible].

(6) State v. Baxter, 38 Ark. 462; Gibson v. State, 59 Miss. 341. Mix v. People, supra.

(7) North Brunswick v. Booream, 10 N. J. L. (5 Halst.) 257.

(8) Bonnifield v. Thorp, 71 Fed. 924; Indianapolis, B. & W. R. Co. v. Maddy, 103 Ind. 200, 2 N. E. 574; Louisville, St. L. & T. R. Co. v. Newsome, 13 Ky. Law Rep. 174; People v. Lamb, 85 Hun 171, 32 N. Y. Supp. 584.

(9) 71 Fed. 824 (appeal dismissed, 83 Fed. 1022).

(10) Citing Hollins v. St. Louis & C. R. Co., supra; Insurance Co. v. Pinner, 43 N. J. Eq. 52, 10 Atl. 184; Hill v. Mendenhall, 21 Wall. 453; McKiernon v. Patrick, 4 How. (Miss.) 336; Howe v. Anderson (Ky.), 14 S. W. 216; Reynolds v. Fleming, 30 Kan. 106, 1 Pac. 61; Williams v. Canal Co., 13 Colo. 469, 22 Pac. 806; affirmed in Dillon v. Rand, 15 Colo. 372, 25 Pac. 185; Winters v. Means, 25 Neb. 241, 41 N. W. 157; Turner v. Caruthers, 17 Cal. 432; People v. Mariposa Co., supra. See also 6 C. J. 635, and cases cited

(11) 4 Cyc. 930.

(12) § 498.

before the praetor in order that he might decide whether the case should go before the judge, like a question which must be raised *ante litem contestam*. In other words, it is not a question of pleading, but a question that goes to the good faith of a sworn officer of the law in his relations to the court, and on this account, the courts have uniformly held that it is such a question as must be taken up independently of the pleadings and by a motion directly for the purpose.

The point which we are called upon, therefore, to determine is whether the above rules reverse this well established doctrine. As their titles show, they are directed to the subject of *defenses* and the methods of presenting them. Prior to their adoption, defenses might be presented by demurrers, pleas and answers. Demurrers and pleas are abolished by the rule, and, as a substitute for the demurrer, the motion to dismiss is adopted.

The question of the authority of an attorney to represent a plaintiff, therefore, does not present a defense to a suit. Since, before these rules were adopted, it was not proper to raise the question either by demurrer, plea or answer, it seems clear that the rules were not intended to contract the sphere of the motion to dismiss, but rather to enlarge it and to require that such motions should be used in the future where formerly it was not customary to do so. And since, before the adoption of the rules, it was proper to raise the question of an attorney's authority to represent his alleged client by a motion to dismiss and improper to do so by the pleadings, it would seem that it is still proper to raise this question by a motion to dismiss, and not by the answer. CHRISTOPHER B. GARNETT, in the *Virginia Law Review*.

HUMOR OF THE LAW.

She. You ought to be ashamed of stealing a kiss.

He. You are equally guilty. You received the stolen goods.—*Edinburg Scotsman.*

Patsy Doolan was taken up on the charge of stealing a watch. His employer was called as a witness to character, and said that he had always found the accused honest and upright. Unfortunately there was evidence to the contrary with regard to the case at issue, and Patsy was convicted and sent to prison, to the great distress of his wife, who left the court weeping bitterly. A neighbor, seeking to comfort her, said: "Och now, Mary, don't take on so. Just think what a good character Mr. Byrne gave your man. Sure we'd never have known what a fine fellow Patsy was if he hadn't stolen that watch."—*Pittsburg Sun.*

An indictment had been found against a colored man, relates the Jacksonville Observer, for (as the indictment read, following the words of the statute) "breaking and entering into a dwelling house in the nighttime, with intent to commit a felony."

The case coming on for trial, the defendant pleaded "not guilty." The testimony showed, without any doubt, that the prisoner, on the night in question, climbed up the piazza to the second floor, and then broke in through a window upstairs, into an upper room. Just then a man rushed into the room and grabbed him before he had a chance to get anything. No evidence was introduced to the contrary. After the arguments of the counsel pro and con, and the charge of the court to the jury, the jury retired to consider their verdict. In a very few minutes the jury had all agreed except one, on a verdict of guilty. This one, however, was a colored preacher, who said he could not agree to such a verdict because, he said, the indictment read that the "breaking and entering was to be with intent to commit a felony." "Now," said he, very emphatically, "whar was de evidence of de intent?" Then a long argument ensued over the question of "intent" between the white jurors and the colored preacher, who repeatedly and emphatically inquired, "Whar was de evidence of de intent?" The white jurors hated to come into court and say that they could not agree upon a verdict of guilty in such a plain case as that, but they could not see any other way to do.

But just then a colored juror, who had been sitting quietly all through the discussion, saying nothing, turned to the preacher, looking him straight in the face, and said: "See heah, youse a preacher isn't you?"

"Yes, I is. I is a minister ob de Gospel," straightening up proudly.

"Well, den, I specks you believes de Bible?"

"Yes, sah I believes ebery word in de Bible."

"Well, den, don' the Bible somewhar say dis: 'Verily, verily, I say unto you, he that entereth not by the door, but climeth up some other way, the same is a thief and a robber?'" (St. John chap. 10, 1st verse.)

The preacher gasped and came immediately down. "Dat so, dat so," he said. "I guess he guilty. Yes, he guilty."

And so the verdict was brought right in.—*Case and Comment.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Attachment**—Amendment of Complaint.—A surety company, executing a bond to release an attachment, such bond undertaking to pay any judgment obtained in the action, is not discharged, under Civ. Code, § 2819, by an amendment of the complaint, not setting up a new cause of action, but merely increasing the amounts demanded for breach of contract.—Turner v. Fidelity & Deposit Co. of Maryland, Cal., 200 Pac. 959.

2. **Attorney and Client**—Attorney's Lien.—An attorney by whom a judgment or decree was obtained for his client has a lien upon a fund arising from enforcement of such judgment or decree against the land of the debtor, by another attorney employed by his client, prior and superior to the lien thereon of such subsequently employed attorney, unless he has expressly or impliedly assented to such subsequent employment or, in some way, relinquished his right further to represent his client in the matter, or, by negligence or other misconduct warranting his discharge, has lost it.—Brown v. Erwin, W. Va., 108 S. E. 605.

3.——Authority of Attorney.—In a summary proceeding in ejectment, where the jury gave possession of the property to the owner and fixed the rental at $111.66, contrary to the testimony of what a fair rental should be, and an intimation by the court that the verdict would be set aside as against the weight of evidence, unless plaintiff consented to a reduction in the rental to $60, held, where it is established that attorney's consent to such reduction and compromise is without express authority from the client and contrary to his instruction, such judgment will be set aside.—Bizzell v. Auto Tire & Equipment Co., N. C., 108 S. E. 439.

4.——Value of Services.—An attorney employed to perfect title to certain land under a contract entitling him to certain interest in the land for such services could not, on client's termination of contract before he had fully performed services, recover as reasonable value of the services, upon quantum meruit, more than the value of the land which would have been his compensation for his services had the title been perfected.—Smith v. Thompson, Tex., 233 S. W. 876.

5. **Bankruptcy**—Motion to Intervene.—Motion to intervene in bankruptcy proceedings by applicants who allowed a default of nearly two months to run against them without any excuse whatever may be denied, in the discretion of the court.—In re Tidewater Coal Exchange, U. S. D. C., 274 Fed. 1011.

6.——Partnership.—Bankr. Act. § 5a, providing that a partnership may be ajudged a bankrupt, treats a partnership as an entity, and in view of General Order in Bankruptcy No. 8, providing that a member of a partnership who refuses to join in a petition to have the partnership declared bankrupt "shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership," that he shall be served with notice, and "shall have the right to appear * * * and to make proof if he can that the partnership is not insolvent or has not committed an act of bankruptcy and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act, "a petition filed against a partnership by one partner alone must conform to the requirements of an involuntary petition and must allege insolvency and an act of bankruptcy by the partnership.—In re Ollinger & Perry, U. S. D. C., 274 Fed. 970.

7.——Priority of Payment.—The United States Shipping Board Emergency Fleet Corporation, incorporated under the general corporation law of the District of Columbia pursuant to Act Sept. 7, 1916, §§ 11, 13, given the President's authority to construct, purchase, and requisition vessels under Act June 15, 1917, by the President's executive order of July 11, 1917, was not entitled to priority of payment under Bankruptcy Act. § 64, and Rev. St. § 3466, of a debt due it from a bankrupt with whom the corporation made a contract as a principal, and not as the agent of the United States government, on the theory that the debt was one due to the United States, since, the corporation having been organized as a private corporation under the District of Columbia's general incorporation law, the government's ownership of the stock did not divest it of its character as a private corporation, in view of §§ 607, 608.—In re Eastern Shore Shipbuilding Corporation, U. S. C. C. A., 274 Fed. 893.

8.——Taxes.—Under Bankruptcy Act, § 64a, claim of the government for taxes is not ordered paid in its entirety as matter of course and the trustee remitted to proceedings under Rev. St. § 3226 to have the money returned, but the bankruptcy court passes on and determines validity of the tax in the first instance; it not being a case where the trustee is seeking to maintain a suit for recovery of internal revenue taxes illegally assessed, the government and not the trustee being the moving party, and this notwithstanding the trustee moves that the government's proof of debt be reconsidered and rejected, a verified proof of debt in bankruptcy having probative force and making out a prima facie case requiring the objector to go forward.—In re General Film Corporation, U. S. C. C. A., 274 Fed. 903.

9.——"Unincorporated Association." — The Tidewater Coal Exchange, an association organized by shippers of bituminous coal during the war with Germany, at the instance of the Council of National Defense, for the purpose of speeding the transshipment of coal from cars to ships at tidewater, etc., involving a general pooling arrangement for coal, with debit and credit charges against and for each member, held an "unincorporated company" within Bankruptcy Act, § 4B, so as to give the District Court jurisdiction of an involuntary petition against it.—In re Tidewater Coal Exchange., U. S. D. C., 274 Fed. 1008.

10.——Voluntary Petition.—There is no presumption of authority in an officer of a corporation to make and file a voluntary petition in bankruptcy, and he may not do so without the consent of the directors.—Regal Cleaners & Dyers v. Merlis, U. S. C. C. A., 274 Fed. 915.

11. **Bills and Notes**—Liability of Endorser.—To render an endorser liable on a negotiable note, it must be presented at the particular time and place specified therein and timely notice of its dishonor given the endorser, unless it is alleged and proven that he in some way waived such notice.—Hastings v. Gump, W. Va., 108 S. E. 600.

12. **Brokers**—Commission.—A commission is earned when the broker produces a purchaser accepted by the principal, and the subsequent

agreement of the principal and the buyer to abandon the contract will not defeat the broker's claim for commission, nor place on the broker the burden of restoring to the purchaser a deposit on the price not in excess of the agreed commissions.—Smith v. Eells, Iowa, 184 N. W. 385.

13.——Commission.—A broker who undertakes to find a purchaser for land at a stipulated price earns his commission when he procures and produces to his principal a person who is able, ready, and willing to buy at that price, and he does not earn his commission if he fails to produce such a purchaser; but, if a broker has brought the parties together and they conclude a contract, he is not deprived of his right to a commission by the fact that the contract differs in terms from the one which he was authorized to negotiate, provided the negotiations commenced by the broker continued uninterruptedly.—Dancy v. Baker, Ala., 89 So. 590.

14. **Constitutional Law**—Due Process.—It is a violation of the Fourteenth Amendment of the federal Constitution, if a judgment in a personal action is enforced, which has been entered by default on the service of the summons by publication; but, unless process is issued on the judgment in an effort to enforce it defendant cannot claim his rights are violated.—Cahill v. Broadwell Productions, N. Y., 190 N. Y. S. 225.

15. **Contracts**—Mutual Agreement.—A contract, "We, the undersigned, children of R., and the only beneficiaries under her will," agree to turn over to the executor an eighth part of the property of the testatrix from our distributive share, with the understanding that the same shall be paid to disinherited grandchildren, who did not sign held obviously drawn as a mutual agreement between the several parties, to be signed by all of them, which was not binding on any of them, where all did not sign.—Hess v. Lackey, Ind., 132 N. E. 257.

16.——Public Policy.—In contracting with a lumber company that the latter assume liability for the loss of lumber deposited on a wharf during a strike of longshoremen, the wharfinger violated no law against public policy.—Northwestern Mut. Fire Ass'n v. Pacific Wharf & S. Co. Cal., 200 Pac. 935.

17. **Corporations**—Purchase of Stock.—An agreement of a corporation with an intending purchaser of stock to take back the stock on demand is enforceable by such purchaser.—Williamson v. Marshall, Cal., 200 Pac. 1058.

18. **Criminal Law**—Sufficiency of Indictment.—Burglary indictment, charging that defendant broke into named person's private garage, held to charge crime with sufficient certainty, notwithstanding failure to define the word "garage," or to state that the private garage was a building; the word "garage" being well understood to mean a building for the storage of automobile vehicles.—Taylor v. State, Ind., 132 N. E. 294.

19. **Eminent Domain**—Railroad Property.—Railroad property is not to be condemned for a street, though it be not actually in use, if it will be needed for the company's use in the future; and this, though the railroad's franchise from the city to operate on certain streets has been forfeited by the city.—In re 221st Street, N. Y., 190 N. Y. S. 235.

20. **Fish**—Police Power.—The state may, under its police power, for the protection in the streams, lakes, and ponds of this state, and for the purpose of encouraging the breeding of fur-bearing animals and other game which have access to the public waters of the state prohibit the depositing of crude oil and other deleterious substances therein.—State v. Wheatley, Okla., 200 Pac. 1004.

21. **Gifts**—Joint Bank Deposit.—A bank's transfer of a savings account, if made in conformity with an order of the depositor authorizing its change to a joint account between himself and wife, subject to withdrawal by check of either, the balance on the death of either to belong to the survivor would not be a valid gift, where it was not shown that such depositor, in his lifetime, released control and dominion over it.—Pearre v. Grossnickle, Md., 115 Atl. 49.

22. **Guardian and Ward**—Illegal Agreement.—Although the guardian, mother of the ward, had a right to use and enjoy his property as her residence during her life, her contract as guardian, with a purchaser made privately, to let him have all the property would bring on sale by court order above a certain amount, was known to the purchaser to be illegal and void, and he cannot maintain an action against her personally thereon.—Wilson v. McKleroy, Ala., 89 So. 584.

23. **Highways** — Negligence. — Where the traveled track of a public road is to one side of the center thereof, it is not negligence as a matter of law to drive in such track, though it be upon the left side of the road to the particular driver.—Keane v. Butner, Minn., 184 N. W. 571.

24. **Homicide** — Trespasser. — Officers who went on the porch of accused's house in a peaceable manner and with lawful purpose, and without intent to search his barn for intoxicating liquors without a warrant, if he objected were not trespassers, and court properly refused to so charge in a homicide case.—Lakey v. State, Ala., 89 So. 605.

25. **Insurance**—Crops.—Although under C. S. § 2355, the possession and title to all crops raised by tenant or cropper in the absence of a contrary agreement are deemed to be vested in the landlord until the rent and advancements have been paid, this does not divest the tenant of an insurable interest in the crops before division.—Batts v. Sullivan, N. C., 108 S. E. 511.

26.——"Immediate Notice."—The policy covering the case required that, in event of accidental death, immediate notice must be given to the company. This means within a reasonable time. Almost immediately after death the soliciting agent who negotiated the policy procured it and surrendered it to the company as plaintiff claims without her authority. It was never returned to her though later demanded. Held, this and other circumstances in the case excused plaintiff from giving notice of death.—Frommelt v. Travelers' Ins. Co. Minn., 184 N. W. 565.

27.——Proof of Loss.—Where insurer's adjuster, on being notified by insured that his automobile had been stolen, promised to take care of him, took charge of the matter, examined the policy and other papers, made a record of the case from answers to questions asked of insured, and promised they would return the car or pay for it within 60 days, it waived subsequent tender of proof of loss.—Doubles v. Insurance Co. of North America, Mich., 184 N. W. 539.

28.——Repairs.—A marine policy provision that no claim of loss shall go beyond the cost of actual repairs considered with provision for estimating loss, held merely a limitation of claim for loss to the cost of repairs, if made, and if no repairs are made, insured may recover damages found on survey.—Walker v. Liverpool & London & Globe Ins. Co., N. Y., 190 N. Y. S. 255.

29. **Insurrection and Sedition**—Martial Law.—Martial law operating, in the government of territory, as a substitute for the civil law, or as an addition thereto, so as to restrict the liberties of citizens and augment the powers of officers, is an incident of military operations and of actual military occupation of the territory so governed; wherefore it cannot obtain in the absence of such operations and occupation.—Ex parte Lavinder, W. Va., 108 S. E. 428.

30. **Intoxicating Liquors** — Liability for Wife's Acts.—In a prosecution of a husband, his wife already having pleaded guilty to violation of liquor law in their home, the act being malum prohibitum and not malum in se, it is not necessary to prove his criminal intent, his liability, if not doing what he could to prevent her violating the law, resting, not on the presumption of his coercion of his wife, but on his authority to control the household

affairs and use reasonable means to prevent violation of law.—People v. Sybisloo, Mich., 184 N. W. 410.

31.——Sufficiency of Proof.—In a proceding to condemn an automobile used in transporting prohibited liquors, where the user's wife claimed the car, evidence that the husband contributed part of the cash payment, paid for all repairs, generally used the car as his own, claimed it as his at the time of the seizure, and, when the seller refused to sell to claimant executed the purchase-money note, held sufficient to show that the car was his, though claimant furnished the remainder of the purchase price from money earned from boarders and money borrowed by her.—Stutts v. State, Ala., 89 So. 603.

32.——Validity of Ordinance.—A liquor ordinance is not invalid merely because it prescribes a less severe penalty than is prescribed by the Volstead Act for similar offenses.—Ex parte Kinney, Cal., 200 Pac. 966.

33. **Landlord and Tenant**—Liability for Rent.—Where one is in the possession of real estate without special contract, he is liable for rent to the owner or person entitled to possession, and such owner or person entitled to possession may enforce his claim for rent by attachment as provided for by § 3809, Rev. Laws 1910.—McBrayer v. Miller, Okla., 200 Pac. 988.

34.——Tenancy at Will.—If a lease for "about a month" be treated as for an indefinite period creating a tenancy at will, it was such by implication, subject to the common-law rule requiring reasonable notice to terminate, and not within Code 1907, § 4732 requiring 10 days' notice to terminate an express tenancy at will; but, being in fact definite, meaning approximately a calendar month, a holding over created tenancy at sufferance requiring no notice for termination, so that in either event it was error to exclude lessor's demand for possession preliminary to suit for detainer.—Rutledge v. White, Ala., 89 So. 599.

35. **Licenses**—Presumed Reasonable.—A license ordinance, enacted within the police power of a city, is not invalid though a slight mistake is made in calculating the cost of administration, and the fee is fixed too high if the surplus fund after the payment of all reasonable charges, is not so great as to manifest a purpose on the part of the legislative body to make the ordinance a revenue-producing measure.—City of Mayfield v. Carter Hardware Co., Ky., 233 S. W. 789.

36. **Master and Servant**—Compensation Act.—Under Workmen's Compensation Act, authorizing the employer to enforce the liability of a third person causing injury to an employee, and providing that, if the damages recovered exceed compensation paid, such excess must be paid to the employee, the employer's recovery against the wrongdoer is not limited to the amount of compensation paid.—Bethlehem Steel Co. v. Variety Iron & Steel Co., Md., 115 Atl. 59.

37.——Hours of Service.—A railway telegraph operator, who was paid for about 12 hours' service out of 24-hour periods, but was in actual service only 5 or 6 hours, being released for periods of from 1 to 2 hours from time to time by the train dispatcher, held not "on duty" for a longer period than 9 hours, in violation of Hours of Service Act March 4, 1907, § 2.—United States v. New York, N. H. & H. R. Co., U. S. C. C. A., 274 Fed. 321.

38.——Malpractice of Physician.—To render employer liable under Compensation Act for malpractice of physician, the injury must result from the necessary efforts to relieve from the consequences of the original injury received during employment.—Wood v. Vroman, Mich., 184 N. W. 520.

39.——Subrogation.—Injured employe, entitled to compensation under Workmen's Compensation Act for injuries by a third party, cannot by agreement not to sue third party deprive employer, or his insurer of the right of subrogation to employe's right to recover damages against third person under Code Supp. 1913, § 2477m6.—Renner v. Model Laundry, Cleaning & Dyeing Co., Iowa, 184 N. W. 611.

40. **Municipal Corporations**—Defective Sidewalks.—Where city constructed cement sidewalk with slippery surface, so that pedestrians exercising ordinary care slipped thereon, it was liable for the damages sustained; it being the city's duty in the construction of the sidewalks, to make them reasonably safe for the use of pedestrians.—Schuler v. City of Mobridge, S. D., 184 N. W. 281.

41.——"Motor Vehicle."—A bicycle is not a "motor vehicle," within statutes regulating traffic.—Niedzinski v. Coryell, Mich., 184 N. W. 476.

42.——Safety Zone.—In action for injuries to prospective street car passenger struck by defendant's automobile truck passing within six feet from running board of street car in violation of city ordinance, the question whether the pedestrian, whose view of street was obstructed by automobile parked along curb where car stopped, was negligent held for the jury.—Metcalf v. Peerless Laundry & Dye Co., Mich., 184 N. W. 482.

43.——Unauthorized Contract.—Not liable for electric current used under contract with corporation of which officials were stockholders.—City of Hogansville v. Planters' Bank., Ga., 108 S. E. 480.

44. **Nuisance**—Garage.—The construction of a garage building and the operation of a garage business therein on street on which there was heavy traffic, such as street cars, freight cars, and trains, with automobiles and trucks, with the noise and odors incident to such traffic and on which the property was more valuable for business than for residential purposes, will not be enjoined as a nuisance.—Lansing v. Perry, Mich., 184 N. W. 473.

45. **Principal and Agent**—General Agent.—Where one executes a promissory note or a bill of exchange in his own name, with a descriptive suffix, such as "general agent," attached to his signature, and where it does not appear on the face of the instrument that he is acting for or in behalf of any one as principal, the instrument is presumably his individual obligation, and before any one can be held liable thereon as principal it must affirmatively appear that at the time of the execution of the instrument it was the intention of the parties to bind a particular person as principal, and that the maker, in executing the instrument, had authority to act as agent for, and to bind such person as, the principal.—Atlas Assur. Co., Limited, of London, England v. First Nat. Bank., Ga., 108 S. E. 474.

46. **Sales**—Misrepresentation.—A corporation, purchasing scrap iron in reliance on the seller's representation that it was cast iron, which, on discovering the iron delivered was chilled iron and unsuited for the purposes for which it was purchased, stored it where it would be protected and notified the seller it was subject to its order is not liable for the contract price.—Cameron Compress Co. v. Texas Bag Corporation, Tex., 233 S. W. 781.

47. **Searches and Seizures**—Owner's Consent.—That search warrant was not properly issued is immaterial, if owner of searched house consented to the search.—Bruner v. Commonwealth, Ky., 233 S. W. 795.

48. **States**—Public Welfare.—The object of Laws 1920, c. 872, § 5 providing for issuance of bonds by state for a bonus to persons who served in the military or naval service of the United States is public and for the public welfare; a bonus being an incitement to patriotism and an encouragement to defend the country in future conflicts.—People v. Westchester County Nat. Bank, N. Y., 132 N. E. 241.

49. **Street Railroads**—Collision.—Where a driver, whose wagon was struck when he attempted to cross ahead of a street car at a street intersection, saw the approach of the car when it was 80 feet away, the motorman was not required to give a signal of the approach of his car.—Mayer v. Louisville Ry. Co., Ky., 233 S. W. 785.

50. **Stipulations**—Jurisdiction.—Supreme Court had no jurisdiction to consider authority

and jurisdiction of Public Service Commission to make an order concerning rates of a gas and electric company, from which certiorari would lie, under Code Civ. Proc. § 1279, relating to submission of controversies, notwithstanding stipulations of the parties.—City of Rochester v. Rochester Gas & E. Corp., N. Y., 190 N. Y. S. 229.

51. **Taxation**—Alien Poll Tax Law.—The Alien Poll Tax Law of 1921, imposing a poll tax on alien inhabitants without requiring such tax to be paid by similarly situated citizens of the United States, held violative of Const. U. S. Amend. 14, § 1.—Ex Parte Kotta, Cal., 200 Pac. 957.

52.——Foreign Corporation.—New York Tax Law §§ 208 and 2191 providing that a foreign corporation for the privilege of doing business in the state shall pay a tax of 3 per cent on its local income, to be determined by a consideration of the relative value of its entire property and accounts receivable and of its property and accounts receivable in the state, but which authorizes the corporation to present, and the assessing commission to consider, other relevant facts, held to provide a rule of allocation prima facie valid, and not unconstitutional as taking property without due process.—Gorham Mfg. Co. v. Travis, U. S. D. C., 274 Fed. 975.

53. **Vendor and Purchaser**—Vendor's Lien.—Although defendant, purchasing at mortgage foreclosure sale, had notice of complainants' vendor's lien subordinate to the mortgage, there was no privity of contract between defendant and complainants, and defendant, occupying the status of prior mortgagee in possession after default with mortgagor's consent, was not accountable to complainants for rents and profits; the subject of the mortgage being the property of the mortgagee rather than of complainants.—Sollie v. Outlaw, Ala., 89 So. 561.

54. **War**—Seditious Utterances—The indictfor aiding and abetting in an attempt to cause insubordination, disloyalty, and refusal of duty in the military forces of the nations when it was at war, the conduct of the principal being set out, need not allege the means employed by the abettor or the particulars of his incitement, aid, or assistance, but it is enough to charge, in general terms, that he knowingly aided and abetted the principal and induced and procured him to commit the principal offense.—Matthey v. United States, U. S. C. C. A., 274 Fed. 926.

55. **Waters and Water Courses**—Boundary.—Where the patent referred to the official survey which showed a meander line as the shore of the lake, but it appeared that the lake shore varied from the calls for the line so that the fractional subdivisions conveyed by the patent, if extended to the lake shore, exceeded by 50 per cent and 20 per cent respectively, the acreage stated, and the intervening land was intersected with ravines sometimes filled with water, and was of little value until oil was discovered thereon, the shore of the lake, and not the meander line, was the boundary of the tract conveyed by the patent. Greene v. United States, U. S. C. C. A., 274 Fed. 145.

56.——Rates.—Despite the Home Rule Act, the city of New York has no right to bring action against a water supply company, whose water it does not use, to restrain it from putting into effect an increase of rates; the interest referred to in the Home Rule Act being no such interest as is contemplated by Code Civ. Proc. § 452. City of New York v. Citizen's Water Supply Co., N. Y., 189 N. Y. S. 929.

57. **Wills**—"Children."—The word children in a will, does not include grandchildren, and the word "grandchildren" does not include great-grandchildren, unless the will discloses a contrary intention.—Davidson v. Blackwell, Ga., 108 S. E. 469.

58.——Intent.—Where a will states testator's "desire" to leave all moneys and property to his wife, it is sufficient.—In re Golicki's will, N. Y., 190 N. N. S. 266.

59.——Joint Will.—Survivor of joint testators by accepting benefits under the will was bound by its disposition of their community estate, and could not convey or otherwise dispose of any thereof contrary to provisions of the will. —Heller v. Heller, Tex., 233 S. W. 870.

60.——Remainder.—Where testator gave his wife and surviving children equal shares of his estate in remaining after remarriage or death of the wife, with direction that daughters' shares be held in trust during their lives, and after their death paid over to their children, who are heirs at law, with no provision for the case of a daughter dying childless, where a daughter dies without children, the prior and absolute gift to such daughter in case she survives the remarriage or death of the wife will take effect, and the corpus of her share will pass to her heirs, executors, administrators, and assigns, and therefore she has the right to alien or assign such share.—Perin v. Perin, Md., 115 Atl. 51.

61.——Undue Influence.—A will leaving only $100 to wife was not of itself sufficient evidence of undue influence.—In re Wall's Estate, Cal., 200 Pac. 929.

62. **Witnesses**—Reference to Books.—In action for price of barrels, witness who had copied into a book the number of barrels delivered to customers, with names of customers to whom delivered, from entry of the number of barrels delivered and customer to whom delivered, made by an employe on a calendar sheet which had been lost at time of trial, was properly permitted to testify as to the entries she found on such calendar sheets after refreshing her memory by reference to the copy made.—Corbin v. Staton, Md., 115 Atl. 23.

63. **Work and Labor**—Implied Contract.—In an action on implied contract to recover from defendant for constructing curbing in front of her lots, as ordered by the village authorities, the fact that after the work was done, and while measurements and frontages were being taken by the village clerk, he requested defendant to exhibit her deed, which she did after stipulating it was without prejudice to herself, constituted no acquiescence on her part, and did not bind her.—Peters v. Adams, N. Y., 190 N. Y. S. 220.

INDEX-DIGEST

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SUBJECT-INDEX

TO ALL THE "DIGESTS OF CURRENT OPINIONS" IN VOL. 93.

This subject-index contains a reference under its appropriate head to every digest of current opinions which has appeared in the volume. The references, of course, are to the pages upon which the digest may be found. There are no cross-references, but each digest is indexed herein under that head for which it would most naturally occur to a searcher to look. It will be understood that the page to which reference, by number, is made, may contain more than one case on the subject under examination, and therefore the entire page in each instance will necessarily have to be scanned in order to make effective and thorough search.